86-868

No.

Supreme Court, U.S.
FILED
OCT 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LELAND G. STAHL

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Dated: October 29, 1986

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QUESTIONS PRESENTED FOR REVIEW

Issue 1:

Whether a ruling of political question in a criminal case is a denial of minimal due process because petitioner is convicted without benefit of any judicial forum in which to test the Constitutional validity of the statutes under which he is charged, and whether such ruling if allowed to stand mandates dismissal of the charges against petitioner for lack of minimal due process.

Issue 2:

Whether Section 205, revised Statutes of the United States, which authorizes the Secretary of State of the United States to certify and proclaim an amendment to the Constitution of the United States is an unconstitutional delegation of power from the Legislative Branch to the Executive Branch so that an extension of the Legislative enrolled act rule to

certification of a Constitutional amendment based on that statute also would be unconstitutional.

Issue 3:

Whether the presence of fraud should override application of the enrolled act rule.

Issue 4:

Whether lateness of the hour can be a factor in application of the political question doctrine, and if not, whether lateness of the hour standing alone can be the basis for the court's refusal to look into ratification of a Constitutional amendment.

Issue 5:

If the ruling of political question is reversed by this Supreme Court, and other legal issues raised by petitioner are decided in his favor, whether the Court should remand to the district court for a full evidentiary hearing.

Issue 6:

Whether the income tax as to a wage earner is based on the Sixteenth Amendment, and if so, should respondent be sanctioned for asserting to the contrary in the face of the many cases where courts have sanctioned taxpayers for arguing to the contrary.

OPINIONS BELOW

The ruling of the District Court on the pretrial motion to dismiss at issue here was a denial rendered verbally at a pretrial hearing on April 19, 1985 and which Transcript is included herein as part of the Appendix, page A-35.

The official published opinion of the Ninth Circuit Court of Appeals filed June 30, 1986, which affirmed the District Court, is published as United States v. Leland G. Stahl, 792 F.2d 1438 (1986), and is included herein as part of the Appendix, page A-1.

The order denying petitioner's Petition for Rehearing and Suggestion of Rehearing En Banc was entered September 2, 1986 and is included herein as part of the Appendix, at page A-33.

STATEMENT OF JURISDICTION

Jurisdiction of the federal District Court below was pursuant to 18 U.S.C. §3231. Its ruling on the issue appealed was on April 19, 1985, and judgment was entered at sentencing on May 22, 1985.

Jurisdiction of the Ninth Circuit Court of Appeals was pursuant to 28 U.S.C. §1291. The opinion in the Ninth Circuit was entered June 30, 1986, and petitioner's timely filed Petition for Rehearing and Suggestion of Rehearing En Banc was denied on September 2, 1986.

Jurisdiction of the United States Supreme Court to review the ruling of the Ninth Circuit by Writ of Certiorari is conferred pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

Article I, Section 8, Clause 1, U.S. Constitution:

"The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and General Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; .... "

Article I, Section 2, Clause 3, U.S. Constitution:

"Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers...."

Sixteenth Amendment, U.S. Constitution:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Section 205, Revised Statutes of the United States:

"Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forth with cause the amendment to be published in the

newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."

26 U.S.C., Section 7203:

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of Section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than one year, or both, together with the costs of prosecution."

26 U.S.C. Section 7206(1):

"Any person who ... willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter ... shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ..., or imprisoned not more than 3 years, or both, together with costs of prosecution."

STATEMENT OF THE CASE

Leland G. Stahl was indicted for three counts of willful failure to file tax returns under 26 U.S.C. §7203 and one count of false statement on a tax return under 26 U.S.C. §7206(1). Stahl filed a pretrial motion to dismiss challenging the validity of the Sixteenth Amendment to the United States Constitution because of fraud in its ratification. At the hearing on the motion, the court verbally denied the motion and did not hear evidence thereon that day but directed that evidence on the motion be submitted within ten days following. The Transcript of the hearing is included in the Appendix, page A-35. Stahl's trial began three days later and he was convicted on all four counts. Stahl filed evidence with the court within the ten days as directed. The evidence consisted of the affidavit of William J. Benson together with supporting books and copies of certified documents. The prosecution submitted no evidence.

Stahl was incarcerated after the verdict, and then

granted bail pending appeal at his sentencing a month later. Stahl appealed to the Ninth Circuit Court of Appeals, the only issue raised being the denial of the motion to dismiss involving the Sixteenth Amendment.

The issues considered by the Ninth Circuit were:

1. Whether or not the Sixteenth Amendment to the United States Constitution is the basis of Congress' authority to levy non-apportioned income taxes;
2. Whether or not the "Lateness of the Hour" doctrine applies to the facts of this case;
3. Whether or not the issue of the validity of the ratification of the Sixteenth Amendment is justiciable; and
4. Whether or not fraud was involved in the adoption of the Sixteenth Amendment.

Briefs were filed, oral argument heard and the entire District Court record certified to the Ninth Circuit.

On June 30, 1986, the Ninth Circuit affirmed the District Court in a published official opinion, a copy of which is attached hereto in the Appendix, page A-1. The basis for the decision primarily was that Stahl's challenge to the validity of the ratification of the Sixteenth Amendment is a nonjusticiable political

question and, therefore, to inquire into it would show lack of respect due to coordinate branches of government. The court also stated that the length of time the Sixteenth Amendment has been judicially applied is further justification for ruling that the issue is political in order not to promote disorder. Lateness of the hour, therefore, rather than being considered as a separate issue, played a part in the decision of political question.

Stahl filed a petition for rehearing en banc raising three points for the court's consideration, a copy of which is attached hereto in the Appendix, Page A-10.

On September 2, 1986, the Ninth Circuit denied the petition for rehearing, a copy of which order is attached hereto in the Appendix, page A-33, whereupon Stahl files this Petition for Certiorari.

Stahl filed a request with the Ninth Circuit that the record be certified and transmitted to the Supreme Court, pursuant to Rule 19.1, Supreme Court Rules, on the basis that the record is essential to a proper

understanding of the case by this Court. Stahl has been informed by the Ninth Circuit that the record will be certified and transmitted upon request of this Court.

The factual basis for the motion to dismiss simply stated is research was done on the ratification of the Sixteenth Amendment to the United States Constitution in Washington, D.C. and in all 48 States which considered the amendment. The individual who did the research, William J. Benson, obtained certified documents which show conclusively that the Secretary of State in 1913, Philander C. Knox, who certified and proclaimed the Sixteenth Amendment as properly ratified, knew that in fact it was not properly ratified by the requisite number of states. That fraud, if established, would render the Sixteenth Amendment null and void, and, therefore, any statutes rendered under its authority null and void.

Petitioner is criminally charged under two such statutes, 26 U.S.C. §7203 and 26 U.S.C. §7206(1), and he therefore has challenged their Constitutional

validity based on the factual evidence of fraud obtained by Benson and now on the record of this case.

Further detail of the factual basis for fraud is stated in the Argument section of this Petition at pages 31-34.

REASONS THIS COURT SHOULD GRANT CERTIORARI

First, the rulings below that Stahl's challenge to the Constitutional validity of the Sixteenth Amendment and the criminal tax statutes enacted pursuant thereto is a political question has brought him face to face with a due process issue of first impression which must be dealt with by this Court. That due process problem simply stated is, never before has the political question doctrine been applied in a criminal case resulting in denial of every opportunity for defendant to test judicially the validity of the statutes under which he is charged. In every case where an issue has been held to be a political question, the case was civil so no one was incarcerated or fined as a result of the ruling that the court would not hear the issue. If this ruling now is allowed by this Supreme Court to stand, then the only course of action the Court then can take is to dismiss the charges against petitioner because he cannot be punished criminally without minimal due process.

Second, should this court decide that extension of the political question doctrine to a criminal case is to be allowed, over petitioner's objections, then this Court should review whether the Ninth Circuit's application of the doctrine in this particular case is proper. In analyzing the issue here, the Ninth Circuit applied the enrolled act rule in Field v. Clark, 143 U.S. 649, (1892), as extended to certification and proclamation of a Constitutional amendment by the Secretary of State in Leser v. Garnett, 258 U.S. 130 (1921).[1/] The Court in Leser relied on a statute, Section 205 of the Revised Statutes of 1878, now 1 U.S.C., Section 106(b), which provides that the Secretary of State is to perform the function of certification and proclamation of an

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1/ The Ninth Circuit first cited United States v. Thomas, 788 F.2d 1250, 1253-54 (7th Cir. 1986) where the Seventh Circuit also ruled that this challenge to the Sixteenth Amendment is a political question. Thomas relied also on Field v. Clark and Leser v. Garnett in its analysis of political question.

amendment. That function is legislative, so Section 205 constitutes a delegation of Legislative power to the Executive Branch.

Such delegation of power was held to be subject to certain strict criteria in Bowsher v. Synar, 54 Law Week 5064 (U.S. Supreme Court, July 7, 1986), on which the lower court decision came out after oral argument but prior to the Ninth Circuit's decision of this case. Even though it was clearly placed before the Ninth Circuit in Stahl's petition for rehearing, the court has failed to rehear this case to reconsider whether Section 205 is an unconstitutional delegation of powers, and if so, what effect that finding would have on the Leser extension of the Field enrolled act rule to certification and proclamation of a Constitutional amendment.

This Court should consider whether the delegation of powers in Section 205 is Constitutional because of the importance of uniform application of the strict criteria for delegation of powers.

Resolution of this issue by this Court is crucial to Stahl's appeal because the Ninth Circuit's extension of Field to this case by means of Leser is the basis for its reasoning that the existence of fraud has no effect on application of the political question doctrine to this case. Field stated that the remote possibility that fraud could take place sometime in the enactment of legislation was no bar to application of the enrolled act rule on the Field facts where there was no fraud. A determination here that the Leser extension of Field to a Constitutional amendment is based on an unconstitutional statute would invalidate the Ninth Circuit's reliance on Field in this case for determining the effect of fraud.

Third, even if this Court finds that Section 205 is Constitutional so that the Ninth Circuit's reliance on it here is not improper, this Court should still reconsider the Field v. Clark reasoning that fraud should not bar application of the enrolled act rule. In Field, to refute application of the enrolled act rule, it was argued that

a fraudulent Legislative Act could be foisted upon the people if the Court adhered to strict application of the enrolled act rule. The Court, however, responded that the remote possibility of a fraud sometime in the Legislative process would not deter it from applying the enrolled act rule on the facts in Field. 143 U.S. at 672-673. That position must be reconsidered where evidence of fraud is actually admitted to the record and is uncontroverted by respondent. The petition for rehearing clearly set before the Ninth Circuit the difference between Field, where the remote possibility of fraud was suggested only as an argument and never purported to be actually present, and this case where fraud is the basis for the whole challenge to the Sixteenth Amendment.

This Court should grant certiorari and reconsider whether fraud should affect application of the enrolled act rule. To the extent Stahl can determine, this case is one of first impression in that never before has an actual fraud of this magnitude in ratification of a

Constitutional amendment been raised and admitted on the record.

Fourth, one of the issues before the Ninth Circuit was whether lateness of the hour should preclude judicial consideration of fraud in the Sixteenth Amendment. While the Ninth Circuit did not deal specifically with the issue, it did use lateness of the hour as a justification for finding political question in order not to promote disorder. See, Ninth Circuit Opinion, page A-9. Stahl did not raise lateness of the hour again in the petition for rehearing because it was fully before the court when it made its initial decision. However, it must be raised here. A recent case, Hohri v. United States, 782 F.2d 227 (D.C. Cir. 1986), involving the internment of Japanese during World War II, decided after briefing on this case in the Ninth Circuit was concluded, established that it is never too late to inquire into a matter when a newly-discovered fraud is alleged. Hohri was argued by Stahl in the Ninth Circuit at oral argument.

This Court should grant certiorari to consider what effect lateness of the hour has on a case of fraud. The Ninth Circuit's opinion that it is too late here, even with the presence of fraud, has created a conflict between the Ninth and D.C. Circuits as to the effect of fraud on lateness of the hour.

Fifth, if this Court rules that this case is judicial and timely for any of the reasons already stated by Stahl, then because the District Court did not hold a full evidentiary hearing on the issue of fraud, and did not rule on the issue of fraud, the record is incomplete for an appellate review of the facts. This case must be reversed and remanded with instructions to the District Court to hold a full evidentiary hearing.

Sixth, respondent argued in its briefs to the District Court and the Ninth Circuit that the income tax as to a wage-earner, which Stahl is, is not based on the Sixteenth Amendment, but rather is an excise tax. The District Judge expressed his opinion in his verbal denial of Stahl's pretrial motion to dismiss that the

basis for the tax is not the Sixteenth Amendment. Stahl in his Reply brief called to the Ninth Circuit's attention clearly that taxpayers have made that argument in the courts for years, and it has been held over and over to be frivolous and without merit. In recent years, taxpayers have been assessed double costs under Rule 38, F.R. App. P. for making the argument. United States v. Buras, 633 F.2d 1356 (9th Cir. 1980); Davis v. United States, 742 F.2d 171 (5th Cir. 1984); Parker, Sr. v. Commissioner, 724 F.2d 469 (5th Cir. 1984); see, also, Martindale v. Commissioner, 688 F.2d 1171 (9th Cir. 1982). Stahl demanded that the government also be assessed with sanctions for making the identical argument. The Ninth Circuit did not address the issue in its opinion. Stahl, therefore, now asks this Court to consider on certiorari whether the income tax as to a wage-earner is based on the Sixteenth Amendment, to clear up confusion which is developing between courts on the issue. If the decision of the Court were that the tax is based on the Sixteenth

Amendment, then Stahl asks the Court to consider whether sanctions should be ordered against respondent, it being imminently fair that all parties to a case be held to the same standards regarding frivolous arguments.

For each and all of the reasons above-stated, Stahl's Petition for Certiorari should be granted.

ARGUMENT

Of first concern to Stahl is denial of minimal due process because of extension of the political question doctrine to a criminal case. In fact, one may as well label Stahl a political prisoner. Never before to the extent that Stahl has been able to discover has a criminal defendant been deprived of a judicial forum to test the criminal statute under which he is charged. Stahl has been told by the lower courts that their doors are shut and he must go to Congress for help. Yet, as was amply stated by Stahl to the Ninth Circuit, even were Stahl to convince Congress to act on the issue, nothing Congress can do can recover jail time or money lost in fines. The actual real-life effect of this ruling on Stahl as an individual is blatantly unconstitutional. He has been put in a position different from any other criminal defendant.

In a broader sense, also, the effect of the ruling is to render every defendant in a prosecution under criminal tax statutes enacted pursuant to the Sixteenth

Amendment a political prisoner.

Even further, this decision could be dangerous precedent in the challenge of criminal statutes in other areas of the law than tax, where extension of the political question doctrine would force criminal defendants into convictions without opportunity to challenge the statutes, resulting in political prisoners of other types.

The Ninth Circuit in its opinion, at page A-9 herein, states "Consideration of Stahl's contention, 73 years after certification of the amendment's adoption and after countless judicial applications, would promote only disorder." Stahl's contention, which is protected by his right to due process, has been determined by the Ninth Circuit to be less important than both respect due between coordinate branches of government and order in the government and, therefore, his rights are sacrificed.

Clearly, such subversion of rights of an individual criminal defendant is not contemplated by the

Constitution. A criminal defendant is presumed innocent and is not under any compulsion to put on evidence or testify. It is the duty of the Court to see that he receives a fair trial. Indeed, the prosecution is under a duty to see that justice is done which is greater than its duty to seek a conviction. Most juries today receive the familiar instruction that to acquit is not to find against the government because the duty of the prosecutor is to see that justice is done and if a defendant is innocent, justice and the prosecution both are best served by an acquittal. Under that general proposition, respondent should have itself objected to the extension of the political question doctrine to a criminal case as being an impermissible deprivation of due process.

This Court should consider the ruling of the Ninth Circuit on certiorari and if it agrees Stahl has been denied minimal due process, the ruling of political question should be reversed. If in the alternative, this Court allows the ruling to stand, then it must dismiss

the charges against Stahl because he has been convicted without due process. The alternative of dismissal of charges must be followed if this Court simply agrees with the Ninth Circuit, and other Circuits that this issue is political. Stahl has no objection to the Court's wish to show respect for coordinate branches of government so long as he does not go to jail as a result. It is an acceptable solution to this dilemma for him, and should be acceptable to other criminal tax defendants as well, that the Court simply dismiss charges against them brought under statutes into which the Court prefers not to inquire.

If this Court, however, over Stahl's objection, finds that the political question doctrine properly can be applied in a criminal case, then the Court must consider whether application of the doctrine is proper here.

Stahl questions whether Section 205, the statute which provides that the Secretary of State shall certify and proclaim the ratification of a Constitutional amendment, is an unconstitutional delegation of powers

from the Legislative to the Executive Branch. Consideration of this issue on certiorari is crucial to Stahl because the application of Section 205 in Leser v. Garnett 258 U.S. 130 (1921), is the basis for the Ninth Circuit's extension of Field v. Clark (143 U.S. 649 (1892), to this case.

Field, a case involving legislative approval of a tariff act, applied the enrolled act rule, which is that certification of both houses of Congress and the President of the United States that a bill has been properly passed is to be conclusive on the courts and journals, loose papers of the legislature and parol evidence cannot be used to attack its validity in a court. In Leser, which involved whether violations of State legislative procedure could invalidate the ratification of the Nineteenth Amendment, the Supreme Court extended the Field enrolled act rule based on the delegation of powers in Section 205. The Ninth Circuit now has said that the Field rule applies to this challenge to ratification of a Constitutional

amendment using Leser as precedent. The Ninth Circuit refused to make an exception here for fraud because in Field the possibility that a fraud could occur in a legislative act was discussed and rejected as a basis for not applying the enrolled act rule. The Ninth Circuit in so extending Field to this case on the point of fraud, obviously felt bound by the Supreme Court precedent in Leser, that with the presence of Section 205, Field must be rigidly applied even in the case of fraud. Just as obviously, if Section 205 were unconstitutional, the extension of Field to this case would be invalid.

Bowsher v. Synar, 54 Law Week 5064 (U.S. Supreme Court, July 7, 1986), a case involving the Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as the Graham-Rudman-Hollings Act, established strict criteria for evaluation of delegation of powers. These criteria must be uniformly applied and so must be applied to Section 205. Stahl asserts that Section 205 will fail Constitutionally under the

criteria of Bowsher.

Bowsher examined principles involved in delegation of powers between the branches of government, and concluded that, though the general rule is that Congress cannot delegate legislative power to the executive branch, not every such delegation of power must automatically fail, and that in analyzing whether such delegation is acceptable, certain criteria must be met. Specifically, and most important to this case, is the question whether the grant of power contains standards clearly defining and confining the exercise of administrative discretion given to the executive branch in the particular grant of power. This principle if applied to Section 205 shows Section 205 clearly to be deficient. Section 205 states simply that "official notice" must be received by the Secretary of State and then instructs him as to how to publish the certification. Section 205 contains no standards to determine what constitutes a sufficient ratification by a state legislature including whether the wording or

punctuation could be changed or whether the amendment could be amended and contains no standards as to what constitutes official notice of ratification. In fact, the Memorandum between Secretary of State Knox and his Solicitor, on the record here,[2/] shows consultation between the two of them, both executive branch officers, as to what constitutes valid ratification and valid notice. These executive officers, performing what was ruled to be a ministerial duty, Dillon v. Gloss, 256 U.S. 368, 41 S.Ct. 510 (1921), actually were able to exercise discretion because of the lack of standards and the imprecision in Section 205. In fact, that latitude in the statute gave rise to their opportunity to commit the fraud alleged here.

Such lack and imprecision in Section 205 is grossly apparent when it is measured against the standards and

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2/ Memorandum - Office of the Solicitor, "Ratification of the 16th Amendment to the Constitution of the United States", Record Excerpts of Appellant, Filed with Appellant's Initial Brief to the Ninth Circuit Court of Appeals, Excerpt 31-46.

precision held to be adequate in the Graham-Rudman-Hollings Act described in Bowsher.

The delegation of power in Section 205 is deficient under the reasoning of Bowsher. Such finding of unconstitutionality of Section 205 here would mandate a reversal of the Ninth Circuit's ruling of political question which was based on Field.

Assuming arguendo, however, that this Court does not agree with Stahl that Section 205 is unconstitutional, so that Field is applicable to this case, then this Court should consider whether application of the enrolled act rule is correct in a case where fraud is actually on the record as uncontroverted evidence and is the whole basis for the case. Stahl submits that this Court should reconsider its ruling in Field and find an exception for fraud, because, very likely the Court in Field would also have found an exception if actually faced with the issue. The Court, generally, will avoid facing an issue not squarely before it, and fraud was not actually alleged in Field.

The Court stated in Field that the purpose of the enrolled act rule was to avoid the chaos created by a court rummaging in the journals and loose papers of Congress looking for something wrong with a particular Act, and Stahl cannot disagree with that good faith proposition. However, here, the record which establishes fraud is much broader than legislative journals and papers. Here, on the face of the official notices and documents received by Secretary of State Knox in Washington, D.C., sent to him certified and notarized from Secretaries of State of the States, it is apparent that the ratifications were not valid, and yet he still went on to certify and proclaim the Amendment ratified.

Generally, the evidence here shows as follows:

Eleven states amended the Sixteenth Amendment. Oklahoma, for example, changed the proposal so as to require the laying of an income tax pursuant to a census or enumeration, the precise requirement the proposed Amendment sought to eliminate. The amendments to

the Amendment in Oklahoma, and in the other States, were the result of much debate, consideration and reflection in their respective legislatures. The resulting changes were not, therefore, inadvertent errors as claimed by the Solicitor to the Secretary of State in his February 15, 1913 Memorandum to Secretary Knox,[3/] and Knox knew they were not errors because records of the amendments and the debates were sent to him.

The effect of these amendments or changes to the Amendment cannot be satisfied by application of a "de minimus" rationale because also, the facts reveal that the Senate of the State of Kentucky outright rejected the proposed Sixteenth Amendment by a vote of 9 for and 22 against ratification. It is clear that Knox was aware of the vote in Kentucky because he received a copy of the actual Senate Journal which recorded the vote. The fraud lies not in the negative vote in

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3/ Memorandum - Office of the Solicitor, See Note 2, Supra.

Kentucky, but in the certification of the Amendment by Knox knowing that Kentucky, one of the States he counted as ratifying, had rejected it.

An additional five States failed to ratify the Amendment by the required two-thirds majority in one of the chambers of their legislatures, the requirement of a two-thirds majority being a federal rather than State rule. Those States were Georgia, Kansas, New York, New Jersey, and Vermont.

Ten States never voted at all on the proposed Amendment.

Minnesota, California and Ohio never sent official notification to Secretary of State Knox of the action taken by their respective legislatures. Another six States did not record whatever action was taken by their respective legislatures in the Journals of their General Assemblies.

Many States made changes in punctuation, capitalization and grammar in the text of the Amendment and its preamble, which changes were

apparent to Knox on the face of it without resorting to any inquiry into journals or papers back in the State capitols.

Clearly, ratification of the Sixteenth Amendment had no basis in fact at the time Knox certified it and he had full knowledge of the truth. He knew that all the hereindescribed problems with the ratification were present. The official notices from the States were sent under oath by each State official that they were true, accurate and correct. So to the extent those notices showed the described facts as true, he deliberately chose to certify anyway. He committed a deliberate fraud.

This fraud is already on the record of this case, unobjected to and uncontroverted by respondent, and the magnitude of its effect on the entire American people mandates that this Court reconsider whether the enrolled act rule of Field can possibly stand in the face of it.

The Field statements that the enrolled act rule is

warranted because of respect for coordinate branches of government and to avoid disorder surely must pale in comparison to the need for Stahl and the American people to be protected from such injustice. The American people, when informed of the truth, have never been afraid to face disorder when necessary to promote the truth and certainly we hold dear the separation of powers whereby one branch checks the unconstitutional or illegal actions of another branch for the ultimate protection of the Constitutional rights of the people. The American people today like the framers of the Constitution are much more interested in protection of their individual Constitutional rights than in maintaining respect between branches of the government. If the Sixteenth Amendment is ruled invalid, and the tax laws require revision as a result, Congress can produce such revisions properly and in short order, and the American people will cooperate with the process. The Court should not avoid making a correct ruling because of fears of disorder in the

government or the people.

If this Court grants certiorari and ultimately rules that application of the political question doctrine here is improper, then the Court must consider whether it can dispose of other issues raised in the case at this level or whether it must remand for further consideration by the lower courts. Stahl contends that all issues but the factual question of fraud can be disposed of here.

First, lateness of the hour was before the Ninth Circuit and as stated above, the court did not rule specifically on the issue, but did state that lateness of the hour justified a finding of political question to avoid promoting disorder. See Appendix, Page A-9. Stahl's position on lateness of the hour is the same as established in Hohri v. United States, 782 F.2d 227 (D.C. Cir. 1986), which is, that lateness of the hour does not apply in the case of a newly-discovered fraud. This Court can rule on the issue without further consideration by the Ninth Circuit because the Ninth

Circuit in effect ruled that lateness of the hour does apply.

Second, whether the income tax as to a wage earner is based on the Sixteenth Amendment or on Article 1, Section 8 of the Constitution was before the Ninth Circuit, and the court did not mention the issue in its opinion. Stahl believes, however, that the Ninth Circuit's position that the income tax as to a wage earner is based on the Sixteenth Amendment has long been established. Martindale v. Commissioner, 688 F.2d 1171 (9th Cir. 1982); United States v. Buras, 633 F.2d 1356 (9th Cir. 1980). Therefore, a specific ruling on the issue again by the Ninth Circuit in its opinion here is not necessary for this Court to rule on the issue on certiorari. Stahl believes that this Court should rule specifically whether the Sixteenth Amendment is the basis for the income tax on a wage earner to settle the confusion developing between the circuits and between the courts and taxpayers on the issue, as follows.

Taxpayers long have argued that the income tax on

a wage earner is an excise rather than a direct tax under the Sixteenth Amendment and the argument has been uniformly rejected as frivolous and without merit, with sanctions imposed against the taxpayer making the argument in more recent cases. See, eg., Martindale v. Commissioner, supra; United States v. Buras, Supra; Davis v. United States, 742 F.2d 171 (5th Cir. 1984); Parker, Sr. v. Commissioner, 724 F.2d 469 (5th Cir. 1984), and cases cited therein. Many cases have specifically held that the Sixteenth Amendment is the basis of the tax as to a wage earner. See, eg., United States v. Buras, supra; Cameron v. U.S., 54 AFTR 2d 84-6271 (DC Ind. 1984); Hayward v. Day, 619 F.2d 716 (8th Cir. 1980), cert. den., 446 U.S. 969 (1980); Broughton v. United States, 632 F.2d 706 (8th Cir. 1980), cert. den., 450 U.S. 930 (1981); Lonsdale v. Commissioner, 661 F.2d 71 (5th Cir. 1981); Parker, Sr. v. Commissioner, 724 F.2d 469 (5th Cir. 1984); Jones v. United States, 551 F. Supp. 578 (N.D.N.Y. 1982).

Surprisingly, in the face of such authority, respondent here argued in opposition to Stahl's pretrial motion to dismiss that Article 1, Section 8 is actually the basis for the tax on Stahl. TR lines 2-22, page A-49. Even more surprisingly, the District Court stated in its verbal ruling on the motion to dismiss that, "[He] would also think, as to the third ground urged, that the government's power to tax does not draw its roots from the Sixteenth, but from the First Article of the Constitution; . . . ." TR, page A-49, line 25 through page 11, line 2, page A-51.

Respondent again made the same argument to the Ninth Circuit in its brief on appeal.

In the face of courts in all circuits as well as the Tax Court now regularly rendering sanctions against taxpayers raising this argument, it is crucial that this Supreme Court consider the issue and make a final decision.

Assuming this Court would decide that the tax at issue here is based on the Sixteenth Amendment, then

this Court must consider whether this case should be remanded for a full evidentiary hearing on the question of fraud. A finding of fraud is a question of fact to be determined at the trial rather than appellate level. The Ninth Circuit and ultimately this Court can only review such finding to determine whether it is clearly erroneous. So, if fraud were not actually established at the trial court level, this Court would have nothing to review.

When the judge denied Stahl's pretrial motion to dismiss without prejudice, he directed that Stahl complete an offer of proof together with supporting documents. TR lines 4-14, page A-50; TR lines 3-8, page A-52; and TR line 9, page A-73 through line 22, page A-75. Stahl made the offer of proof by affidavit of William J. Benson together with supporting books and copies of certified documents. Respondent has submitted no evidence. Therefore, this case must be remanded to the district court for a further evidentiary hearing.

Lastly, Stahl emphasizes to this Court again the manifest unfairness existing in this case as a result of the treatment by each of the respondent, the trial court and the Ninth Circuit, of the argument by respondent that this tax is not based on the Sixteenth Amendment. Respondent has argued vigorously for sanctions against taxpayers who make this argument, and yet as soon as it seemed advantageous to its own interests, it flip-flopped and asserted the argument itself. The trial judge, in the face of all the precedent to the contrary stated a verbal ruling supporting respondent's position. The Ninth Circuit, with the situation clearly before it, chose not to say anything. Stahl asked the Ninth Circuit for sanctions against respondent under Rule 38, F.R. App. P. in the interest of fairness and uniformity, but to no avail. This Court has expressed increasing concern with fair and uniform judicial administration not weighed in favor of any party, and Stahl now respectfully petitions the Court to consider whether the sanctions should be imposed upon respondent.

As to the verbal ruling by the district court, Stahl certainly would agree that any judge at any time may not agree with established precedent and rule differently. The ruling here, at the least, should be a clear indication to this Court that there is confusion over this issue which is causing inequitable treatment of litigants between circuits and between courts within circuits.

CONCLUSION

Stahl cannot stress more strongly for this Court the magnitude of the injustice that will take place not only to him but to the American people if this decision is allowed to stand without ever an opportunity for review by the Supreme Court, and so he stresses that certiorari should and must be granted. The prospect of the precedent that will be set by this ruling that challenge to a criminal statute can be a political question is one of the most serious due process questions to ever come before this Court. It cannot be allowed to stand that we in the United States can take a political prisoner in this manner for any reason. We must maintain minimal standards of due process in our courts one of which is a fair judicial hearing for each criminal defendant where he has the opportunity to challenge the validity of the law asserted against him.

Preservation of such due process outweighs any considerations of governmental order, governmental convenience and respect between branches of government.

The Ninth Circuit's ruling truly may be an example of the end justifying the means, the end here being the preservation of our present tax structure, however illegal, at all cost, and the means being sacrifice of the most basic of individual rights. This Court should not tolerate it. If the ruling is to stand, then the charges must be dismissed for failure of due process.

The other issues argued herein are crucial also to Stahl's case and must be considered in accordance with whether this Court grants certiorari and then agrees or disagrees with Stahl's position on due process.

Again, Stahl urges this Court to grant certiorari and fully review the issues raised herein.

Dated this 29 day of October, 1986.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the foregoing Petition for Certiorari was duly served by mail upon opposing counsel of record by causing the same to be mailed with sufficient postage to their address stated below on the 29th day of October, 1986.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	)	No. 85-3069
	)	
Plaintiff-Appellee,	)	D.C. No.CR 85-9 BLG
	)	
v.	)	OPINION
	)	
LELAND G. STAHL,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the United States District Court
for the District of Montana
W. B. Enright, District Judge, Presiding
Argued and Submitted February 12, 1986
Seattle, Washington

Before: WALLACE and THOMPSON, Circuit Judges, and STEPHENS, Senior District Judge*

* Honorable Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

THOMPSON, Circuit Judge:

Leland G. Stahl appeals from his jury trial conviction on one count of making a false statement on his income tax return, and of three counts of failing to file income tax returns, in violation of 26 U.S.C. §§ 7206(1) and 7203. Stahl contends that the district court erred by denying his pretrial motion to dismiss the indictment. Stahl based his motion to dismiss on the ground that the sixteenth amendment to the United States Constitution was never properly ratified, fraud was committed in the ratification process, and the amendment is therefore void. We reject Stahl's contentions and affirm.

Stahl argues that the sixteenth amendment was never ratified by the requisite number of states because of clerical errors in the ratifying resolutions of the various state legislatures and other errors in the

ratification process.[1/] He further argues that Secretary of State Knox committed fraud by certifying the adoption of the amendment despite these alleged errors. Secretary of State Knox certified that the sixteenth amendment had been ratified by the legislatures of thirty-eight states, two more than the thirty-six then required for ratification. His certification of the adoption of the amendment was made pursuant to Section 205 of the Revised Statutes of the United States which provided:

1/ Stahl directs the court's attention to the certified copies of the resolutions passed by the legislatures of the several states that ratified the sixteenth amendment. Only four of these resolutions quoted the language of the amendment with absolute accuracy. Thirty-three resolutions contained punctuation, capitalization, or wording errors. Minnesota did not send a copy of the resolution passed by its legislature to the Secretary of State. The secretary of the Governor merely informed the State Department that the legislature had ratified the proposed amendment. Stahl alleges that Kentucky's legislature never passed the proposed amendment. Stahl also alleges discrepancies in the resolution signatures of South Dakota and Washington, and other procedural errors for California (no record of the vote in either house), Ohio (not a state at the time), North Dakota (ratification in the form of a bill, not a resolution), Arkansas (ratification occurred after previous rejection), and Arizona.

> Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the name has become valid, to all intents and purposes, as a part of the Constitution of the United States.

Act of April 20, 1818, ch. 80, § 2, Rev. Stat. § 205 (2d ed. 1878) (amended version codified at 5 U.S.C. § 160 (1940) (repealed Oct. 31, 1951); current version, as amended, at 1 U.S.C. § 106b (Supp. II 1984)).

Secretary of State Knox's certification of the adoption of the sixteenth amendment is conclusive upon the courts. United States v. Thomas, 788 F.2d 1250, 1253-54 (7th Cir. 1986); see also Leser v. Garnett, 258 U.S. 130, 137 (1921). In Leser suit was brought to strike the names of two women from the list of qualified voters in Maryland on the ground that the constitution of Maryland limited suffrage to men. Maryland had

refused to ratify the Nineteenth Amendment. The necessary minimum of thirty-six states had ratified the amendment. The Secretary of State of the United States had certified its adoption. It was contended, however, that the ratifying resolutions of Tennessee and West Virginia, two of the states that had ratified the amendment, were inoperative because the resolutions of those states had been adopted in violation of their rules of legislative procedure. In answer to that contention the Court rules:

> The proclamation by the Secretary certified that from official documents on file in the Department of State it appeared that the proposed Amendment was ratified by the legislatures of thirty-six States, and that it "has become valid to all intents and purposes as a part of the Constitution of the United States." As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts.

Id. at 137.

Stahl attempts to distinguish Leser on the ground that Leser did not involve a claim of fraud in the ratification process. If Stahl's challenge to the validity of the ratification process of the sixteenth amendment is a nonjusticiable, political question, however, that contention is irrelevant.

In Baker v. Carr, 369 U.S. 186 (1962), the Court set out a list of "formulations" which may identify the existence of a political question in a given case:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

Stahl's claim that ratification of the sixteenth amendment was fraudulently certified constitutes a political question because we could not undertake independent resolution of this issue "without expressing lack of the respect due coordinate branches of government." Id. In Field v. Clark, 143 U.S. 649 (1892), the Court encountered a claim that a bill had not in fact been passed by Congress. The Court held that when a bill has been signed by the Speaker of the House and by the President of the Senate and has received the President's approval, "its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. . . . The respect due to coequal and independent departments requires the judicial department . . . to accept, as having passed Congress, all bills authenticated in the manner states." Id. at 672. Significantly, the Court noted the possibility that the Speaker of the House and the President of the Senate could fraudulently impose on the people a bill that was never passed by Congress. But [j]udicial action based upon such a .... suggestion is forbidden

by the respect due to a coordinate branch of the government." Id. at 673.

In Leser, the Court, confronting the claim that ratifying resolutions of two states were inoperative, extended the rule declared in Field to the Secretary of State's authentication that a constitutional amendment had been duly ratified. 258 U.S. at 137. Baker indicates that the application of the political question doctrine in Leser was demanded by the respect due coordinate branches. Baker, 369 U.S. at 214.

Stahl's claim falls plainly within the confines of Leser and Field. Stahl's claim rests on an assertion that the ratifying resolutions of many states were inoperative. Since the Secretary of State proclaimed that the sixteenth amendment had been duly ratified, this assertion presents a political question under Leser. Stahl's suggestion of fraud on the part of the Secretary does not render the question justiciable, for "[j]udicial action based upon such a suggestion is forbidden by the respect due to a coordinate branch of the government."

Field, 143 U.S. at 673. Moreover, in Baker, the Court in discussing judicial review of the ratification process characterized the political question doctrine as "a tool for maintenance of governmental order." Baker, 369 U.S. at 215. Consideration of Stahl's contention, 73 years after certification of the amendment's adoption and after countless judicial applications, would promote only disorder. See United States v. Foster, 789 F.2d 457, 462-63 (7th Cir. 1986).

We conclude that the Secretary of State's certification under authority of Congress that the sixteenth amendment has been ratified by the requisite number of states and has become part of the Constitution is conclusive upon the courts.[2/]

AFFIRMED.

2/ Stahl relies on two district court cases, Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975) (three-judge court), and Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho 1981), vacated as moot mem., 459 U.S. 809 (1982), for the proposition that the matters he seeks to adjudicate are not barred by the political question doctrine. Neither case is binding on this court, nor do we find them persuasive under the facts of this case.

IN THE UNITED STATES
COURT OF APPEALS
FOR THE
NINTH CIRCUIT

Case No. 85-3069

UNITED STATES OF AMERICA,

Respondent - Appellee

vs.

LELAND G. STAHL,

Petitioner - Appellant

On Appeal From The United
States District Court For
The District of Montana
Billings Division

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

CERTIFICATE OF INTERESTED PERSONS

Case No. 85-3069

UNITED STATES OF AMERICA,

Respondent - Appellee

vs.

LELAND G. STAHL,

Petitioner - Appellant

Certification Required by Ninth
Circuit Court of Appeals Rule 13(b)(3).

The undersigned counsel of record of **LELAND G. STAHL** certifies that the following listed parties have an interest in the outcome of this case. These representations are made to enable judges of this Court to evaluate possible disqualification or recusal.

Leland G. Stahl
Gerald P. LaFountain
Lowell H. Becraft, Jr.
Laura Lee

Laura Lee

Attorney of Record for Appellant

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STATEMENT OF COUNSEL

This petition for rehearing and suggestion of rehearing en banc of this Court's decision on June 30, 1986, affirming the District Court in United States of America v. Leland G. Stahl is respectfully brought because, in counsel's judgment, the following three points must be considered:

I. The Court has overlooked a rule of law in making its decision in that the effect of the Court's decision that the issue of fraud in the ratification of a Constitutional amendment is nonjusticiable will be to deprive the defendant-appellant of minimal due process by depriving him of a hearing to challenge the validity of the law under which he is charged with a crime.

II. The Court appears to have overlooked a recent new decision in the law, Synar v. United States,

626 F.Supp. 1374 (D.D.C. 1986), decided February 7, 1986. The Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as the Graham-Rudman-Hollings Act was held to be unconstitutional because of improper delegation of powers between the executive and legislative branches of the federal government. Under that ruling, Section 205 of the Revised Statutes of 1878, now found at 1 U.S.C., § 106(b), the statute which delegates the power to certify ratification of a Constitutional amendment, a legislative function, to the Secretary of State, an executive officer, is also unconstitutional.

III. The Court has overlooked a material fact in that the record from the lower court here contains uncontroverted factual evidence of fraud on the part of government officials in the ratification of the Sixteenth Amendment to the United States

Constitution, as compared to the record in Field v. Clark, 143 U.S. 649, 12 S.Ct. 425 (1892), the case relied on in the Court's opinion, where there was merely an argument made suggesting the possibility that fraud could happen, and Field must be read in the context of its own record when considering a contention of actual fraud here.

The questions presented in this case and the points raised in this petition for rehearing are of exceptional importance because of the effect the resolution of the issues will have upon the entire Nation. Therefore, appellant Stahl suggests that a rehearing of the case be en banc.

ARGUMENT

Appellant Denied Due Process

This Court's decision that the issue of fraud in the ratification of the Sixteenth Amendment is nonjusticiable has deprived appellant Leland G. Stahl ("Stahl") of minimal due process under the Fifth Amendment to the United States Constitution.

The Fifth Amendment states that no person shall be deprived of life, liberty, or property without due process of law, which means that no person may be convicted of crime unless he is charged, proven and found guilty in accordance with due process. Parr v. United States, 363 U.S. 370, 394, 4 L.Ed.2d 1277, 1292, 80 S.Ct. 1171 (1960).

Clearly, due process in a criminal case includes the right to challenge the validity of the law under which the defendant is being prosecuted.

> The right to be heard before property is taken or rights or privileges withdarawn which have been previously legally awarded is of the essence of due process

> of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court.

Garfield v. United States, 211 U.S. 249, 53 L.Ed. 168, 29 S.Ct. 62, 66 (1908).

This general statement was made in a civil case involving citizenship and ownership of land in an Indian Nation. The same right certainly should be inherent in the criminal prosecution of a citizen of the United States. Indeed, the principle is so well-established that Stahl admits experiencing difficulty citing a particular federal criminal case which states the principle precisely. Stahl's case may very well be one of first impression in the respect that never before has a Court attempted to deprive a criminal defendant of a judicial tribunal in which to test the validity of a law under which he is charged, particularly not a federal court.

Each previous case where the United States Supreme Court has held an issue related to ratification of a Constitutional amendment to be political has been

a civil case. No one has ever gone to jail as a result of the Court's ruling that such an issue is political.

This Court's decision that the issue is political, however, results in conviction, jail and fines for Stahl.

This Court's decision that the issue is political instructs Stahl that his only redress for the fraud committed against him is in the halls of Congress. Yet, the awful reality is that were Stahl to prove fraud before the Congress and even obtain some Congressional action to rectify the wrong,[1] that action could never get Stahl out of jail nor could it secure return of fines he had paid.

This Court must face squarely that the result of its decision, literally, is to rob Stahl of any forum in which to make his challenge which would have the

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1/ The possibility of obtaining any Congressional action to rectify the wrong appears remote as indicated by the response of various representatives that "the issue is judicial". See, argument in Stahl's Reply Brief, at page 11, and references to actual letters from Congressional representatives stating that the issue is judicial.

power to give him relief from criminal penalties should he prevail in the challenge.

This Court's duty to protect Stahl and other criminal defendants from denial of minimal due process is greater than its duty to respect a coordinate branch of government. It is a fundamental principle upon which this nation was founded that any person cannot be sent to jail without due process. If this Court persists in its decision that this issue is political, so be it, but in doing so, the Court also persists in denying Stahl due process, and he cannot then be convicted and sent to jail or fined. Therefore, if this decision is to stand, then the case must be remanded with instructions that criminal charges be dropped because due process has become impossible.

Recent New Decision in the Law

Synar v. United States, 626 F.Supp. 1374 (D.D.C. 1986), decided February 7, 1986, contains principles which affect the decision of this case. Synar

involved questions of delegation of powers between the coordinate branches of the federal government which affect the political question doctrine raised in this case, as follows.

This Court in Stahl cited Field v. Clark, 143 U.S. 649, 12 S.Ct. 425 (1892), and Leser v. Garnett, 258 U.S. 130 (1921), to decide that the issue raised by Stahl is a political question.

Field adhered to the enrolled act rule for authentication of the adoption of legislation by Congress, and under that rule the official attestations that legislation has passed Congress are made by legislative officers, the Speaker of the House of Representatives and the President of the Senate. Field, 143 U.S. at 672. A legislative act is also presented to the President of the United States for his signature, but he has no authority to approve a bill not passed by Congress. Id. Only the legislative officers can attest to the passage of an act by Congress and the President must accept its passage upon their certification before

he signs it. In the case of ratification of a Constitutional amendment, the President of the United States is not required to sign the amendment, and it is not passed by the houses of Congress but is proposed by Congress and then ratified by three-fourths of the States. The Secretary of State, a member of the executive branch, officially attests that the requisite number of States have ratified, rather than officers of Congress. The Secretary of State performs this function, which is legislative in nature, pursuant to section 205 of the Revised Statutes of 1878, now found in 1 U.S.C., section 106(b). The Supreme Court, in Leser, extended the Field enrolled act rule to the certification and proclamation of a Constitutional amendment by the Secretary of State based on the authority granted to the Secretary by Congress in section 205. And, this Court in Stahl has cited Leser with approval, in stating that the enrolled act rule of Field must extend to the Secretary of State's certification of the amendment pursuant to the grant of

authority to him in section 205. In extending the Field rule to this case, this Court has accepted language in Field pertaining to the possibility of fraud as controlling of this case.

However, the extension of Field to ratification of a Constitutional amendment based on the grant of power in section 205 must fail if section 205 fails. And, the constitutional validity of section 205 is squarely called into question by Synar.

The Court in Synar carefully examined the principles involved in delegation of powers between the branches of government, 626 F.Supp. at 1383-1391 and concluded that, though the general rule is that Congress cannot delegate legislative power to the executive branch, not every such delegation of power must automatically fail, and that in analyzing whether such delegation is acceptable, certain criteria must be met. Specifically, and most important to this case, is the question whether the grant of power contains standards clearly defining and confining the exercise of

administrative discretion given to the executive branch in the particular grant of power. Id. at 1387. This principle if applied to section 205 which grants the Secretary of State the power to certify ratification of an amendment, shows section 205 clearly to be deficient. Section 205 states simply that "official notice" must be received by the Secretary of State and then instructs him as to how to publish the certification. Section 205 contains no standards to determine what constitutes a sufficient ratification by a state legislature including whether the wording or punctuation could be changed or whether the amendment could be amended and contains no standards as to what constitutes official notice of ratification. In fact, the Memorandum between Secretary of State Knox and his Solicitor, on the record here,[2] shows

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2/ Memorandum - Office of the Solicitor, "Ratification of the 16th Amendment to the Constitution of the United States", Record Excerpts of Appellant, Filed with Appellant's Initial Brief, Excerpt 31-46.

consultation between the two of them, both executive branch officers, as to what constitutes valid ratification and valid notice. These executive officers, performing what was ruled to be a ministerial duty, Dillon v. Gloss, 256 U.S. 368, 41 S.Ct. 510 (1921), see, discussion in Stahl's Reply Brief, p. 12-14, actually were able to exercise discretion because of the lack of standards and the imprecision in section 205. Synar, 626 F.Supp. at 1387. Ironically, that latitude in the statute gave rise to their opportunity to conspire to commit the fraud alleged here.

Such lack and imprecision in Section 205 is grossly apparent it is measured against the standards and precision held to be adequate in the Graham-Rudman-Hollings Act described in Synar, on pages 1387-1389.

The delegation of power in section 205 is deficient under the reasoning of Synar and therefore, Stahl respectfully asserts that this Court's reliance on Section 205 to extend the Field rule to ratification of a

Constitutional amendment in its ruling that the Sixteenth Amendment challenge is a political question is also deficient.

Material Fact Overlooked

This Court bases its decision that the question of fraud in the ratification of the Sixteenth Amendment to the United States Constituiton is a political question primarily upon Field v. Clark, supra, as extended by Leser v. Garnett, supra. The Supreme Court decided Field in accordance with the enrolled act rule, as described above, which precludes inquiry by the Court into the validity of passage of that act. The argument was raised in Field that under such rule, the Court was leaving open the possibility that a bill never passed by Congress could be imposed upon the people. The Court stated that that "possibility" was too remote to be seriously considered in the "present" inquiry, and termed the possibility as only a "suggestion", and then said, "[j]udicial action based upon such a suggestion is

forbidden by the respect due to a coordinate branch of the government." Field, 143 U.S. at 672-673.

It is clear that in Field there was no fraud at issue. There was only an argument made by counsel that it would now be possible that a bill not actually passed could be foisted onto the people.

Appellant respectfully argues that the Court in Field was saying simply that the possibility of such a fraud was remote, and being remote could not be seriously considered in the Field inquiry where it was not actually raised. The Court did not say that it would not seriously consider an actual allegation of fraud in a different inquiry. This interpretation of the Court's statements is supported by the statement quoted above that "Judicial action based upon such a suggestion is forbidden by the respect due to a coordinate branch of the government." The Court states clearly that it will not base a judicial intrusion into a coordinate branch upon a mere suggestion, however, it does not state whether it would act upon hard evidence on the record of actual fraud.

Stahl has not suggested the mere possibility of fraud. He has placed on the record hard evidence, thus far uncontroverted. His is a case which does justify intrusion into a coordinate branch.

The Court in Field immediately following does state that the evils that may result from the recognition of the enrolled act rule would be far less than those evils reuslting from making the validity of Congressional enactments depend upon the manner in which the journals of the respective Houses are kept. Field, 143 U.S. at 673 and 675. Those statements would appear to be applicable here, however, Stahl respectfully asserts that this Court has overlooked material facts in accepting that language as controlling here in that the evidence of fraud in the Sixteenth Amendment goes far beyond "journals, loose papers of the legislature and parol evidence." Id. at 675. This Court has in fact stated several of the foremost examples of the evidence on the record in its footnote No. 1 on page 2 of its opinion.

Clearly, also the evidence of fraud here is in the proper format for presentation to the Court, and most importantly, is uncontroverted by the prosecution.

Stahl recognizes that the goals of the Courts stated in Field to respect a coordinate branch of government and preserve order in government are laudable, however, such goals are not meant to be unyielding when up against a clearly established fraud affecting millions of people and depriving defendants of due process in the criminal arena. The goal of protection of the people from such gross infringement is clearly greater than protecting order in government. The nation was founded by people escaping from this kind of infringement in other lands and it was never intended to be tolerated here, certainly not by the judiciary.

Stahl's challenge to the Sixteenth Amendment is not a political question under Field and Leser but must be heard by the Court, because the Field enrolled act rule as extended by Leser could not have been intended

to stand in the face of the evidence of fraud on the record here.

CONCLUSION

For each and all of the reasons stated herein, Stahl prays that this petition for rehearing be granted and that the order of the District Court appealed from be reviewed by this Court sitting en banc.

RESPECTFULLY SUBMITTED this 12th day of July, 1986.

Laura Lee

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Co-Counsel for Appellant
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(406) 256-8888

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the foregoing was duly served by mail upon opposing counsel of record by causing the same to be mailed with sufficient postage to their address stated below on the 12th day of July, 1986.

Mr. Pete Dunbar
United States Attorney
Mr. Robert L. Zimmerman
Assistant United States Attorney
P.O. Box 1478
Billings, Montana 59103

Laura Lee

LAURA LEE
Co-Counsel for Appellant
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Billings, Montana 59102

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LELAND G. STAHL, Defendant-Appellant.	No. 85-3069 D.C. No.CR 85-9 BLG ORDER

Before: WALLACE and THOMPSON, Circuit Judges, and STEPHENS, Senior District Judge*

Date of Entry: September 2, 1986.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judges Wallace and Thompson have voted to reject the suggestion for a rehearing en banc and Judge Stephens has recommended rejection of the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has

requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

---

* Honorable Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

UNITED STATES OF AMERICA	)	No. 85-3069
	)	
PLAINTIFF,	)	No.CR 85-9-BLG
	)	
VERSUS	)	MOTION TO DISMISS
	)	
LELAND G. STAHL,	)	
	)	Billings, Montana
DEFENDANT.	)	April 19, 1985, 10 am
	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS ON APPEAL BEFORE THE HONORABLE WILLIAM B. ENRIGHT, WITHOUT A JURY SITTING IN THE DISTRICT OF MONTANA

APPEARANCES:

For the Government: Byron H. Dunbar, Esq., U.S. Atty.
By: Robert Zimmerman, A.U.S.A.
P. O. Box 1478
Billings, Montana 59103

For the Defendant: Lowell H. Becraft, Jr., Esq.
110 South Sipe Square
Huntsville, Alabama 35801

LaFountain Bearcrone &
LaFountain
By: Gerald P. LaFountain, Esq.
208 North 29th Street, Suite 228
Billings, Montana 59101

Laura Lee, Atty.
1250 15th Street West
Billings, Montana 59102

Billings, Montana, Friday, April 19, 1985, 10:00 a.m.

---000---

The Court: Good morning, ladies and gentlemen. My apologies for the delay.

The Clerk: Number two on the calendar is case number 85-9-BLG, United States versus Leland Stahl, for hearing motion to dismiss.

The Court: Are the parties ready in that matter?

Mr. La Fountain: Defense is ready.

Mr. Zimmerman: United States is ready.

My name is Bob Zimmerman, Assistant United States Attorney.

Mr. LaFountain: Gerald LaFountain, representing Leland Stahl.

The Court: All right. Mr. LaFountain, I have read

and considered the motion papers that you have filed. Is there

any additional comment, sir, you care to make?

Mr. Becraft: Your Honor, if it please the Court, my

name is Larry Becraft, Jr.; Lowell H. I go by Larry. I am

from Huntsville, Alabama. I am the draftsman of the motion you

have before you. It's the one that's going to be heard today.

Mr. LaFountain is the Defense Counsel for Leland

Stahl. He will be trying the case. I am here on an extremely

limited basis, that basis being solely to introduce evidence

concerning the motion to dismiss.

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Also, local counsel with us is the lady sitting right

here, whose name is Laura Lee. She is here from Billings,

Montana.

The Court: All right. Let me see if I understand.

Ms. Lee, then, is counsel of record, along with Mr. LaFountain. You are appearing specially for the purposes of this motion?

Mr. Becraft: That is correct, Your Honor.

The Court: That's your understanding, Mr. LaFountain?

Mr. LaFountain: Yes, Your Honor.

The Court: Is the Defendant physically present?

Mr. LaFountain: (indicating.)

The Court: All right. I would be happy to hear from you, sir. Can you give me some insight into what you propose to do this morning, sir?

Mr. Becraft: Yes, Your Honor. First of all, let me tell you the motion. The motion itself explains the general basis of what we are talking about.

Basically, we are contending, and in this particular

case, that the Sixteenth Amendment to the United States Consti-

tution has not been ratified. It is, therefore, not a part of

the Constitution. We further contend that the basis for the

Federal income tax laws here in the United States are based

upon the Sixteenth Amendment to the United States Constitution;

and, of course, I know that the government may--probably does

differ with us in that respect, but I would like to point out

to the Court, in response to a brief that they filed, that we

got a copy of yesterday, a case coming from my part of the

country, Parker against Commissioner of the Internal Revenue.

I have a copy here, and I will be glad to give it to the Court.

The cite is 724 F.2D 469.

In this particular case, the Fifth Circuit said that

the basis for the federal income tax laws here in the United States is the Sixteenth Amendment to the United States Constitution. Therefore, we are contending that, in the Motion to Dismiss, that the defendant has been charged with infractions contained in Title 26, the 7200 Chapter, and that since that is based totally and completely upon the Sixteenth Amendment to the United States Constitution, that there cannot be any further prosecution in this case, and that it's due to be dismissed.

Now, Your Honor, the evidence that we have to support the allegations that we make will come from a man by the name of Mr. Bill Benson. Now Mr. Benson is a former special agent with the Illinois Department of Revenue.

The Court: You are making this as an offer of proof, then, sir?

Mr. Becraft: No, Your Honor. I would like to intro-

duce testimony.

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The Court: I went to know what your offer of proof is

before we hear it, sir.

Mr. Becraft: The proof that we will be introducing in

reference to this particular motion consists of a number of

documents. To explain the significance of these documents, I

think it will be in order for me to, at this point in time,

explain what Mr. Benson has done.

Starting in January, 1984, Mr. Benson traveled to all

48 states in the union. The purpose of those travels was to go

from state to state, from state capital to state capital,

examine the House and Senate journals and the legislative acts

of each individual state insofar as they concern the ratifica-

tion of the Sixteenth Amendment.

Now Mr. Benson started that project in January of '84.

By August of '84, he had completed 29 states. At that point in

time, after--28 states, excuse me.

At that point in time, he went to Washington, D.C.,

and discovered some materials in the National Archives. Then,

after he discovered the material in the National Archives, he

completed the remainder of the 48 states that were then in the

Union in 1931.

We have before us, and what I will be introducing into

evidence today are the Senate House journals and other docu-

ments that come from several states. We will be introducing

material from the Senate House journals from Kentucky, from the

states of Washington, from Oklahoma, from California, from

Oklahoma, Arkansas, Tennessee, Missouri and Georgia. Further,

we will be introducing documentation that comes out of the

National Archives in Washington, D.C.

Now all of this material, which shows conclusively

that, as to the states that we will be introducing today, and

we are only--we are not bringing in the whole ball game, so to

speak. If we brought in the whole ball game, it would take

forever to hear this motion, and we are just bringing in the

evidence in reference to a limited number of states and in

reference to evidence we have obtained out of the state of

Washington--I mean out of Washington, D.C., out of the National

Archives.

All of this documentation will show that the Sixteenth

Amendment, the certificate which allegedly ratified the Six-

teenth Amendment, which was signed on February 25, 1913, by the then Secretary of State of the United States, Flander E. Knox, this documentation will prove conclusively, beyond any reasonable doubt, that Flander Knox filed a fraudulent certificate; that the Secretary of State, Flander Knox, is guilty of criminal malversation, and that he violated an act which he had placed into his archives on March 4, 1908, when he became Secretary of State of the United States.

That is embodied in 18 United States Code Section 1018. I think, if the Court will examine the evidence that we

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have available with us today, the obvious, clear, and conclusive conclusion will be that the ratification of the Sixteenth Amendment is not, in fact, a part of the United States Constitution.

I believe that this is a brief summary of the evidence that we have introduced.

The Court: Has this motion been brought before in any of the federal courts, that you are aware of, sir?

Mr. Becraft: Yes, Your Honor. I have raised it in another case in Indiana.

The Court: With what result?

Mr. Becraft: Well, the points that were brought out by the--I don't know whether the court has seen the brief that was filed by the prosecution in this case yesterday. We got it, and that brief raises two basic issues. It says that the examination of the Sixteenth Amendment, at this point in time, is a political question.

The basis for that is a United States Supreme Court case decided in the Thirties, a case called Coleman Against

Miller, which is cited in the brief of the government. That

supports their contention that the argument that we are making

here is a political question.

Further, another argument that the government is mak-

ing is that--

The Court: That wasn't my question, though. What

happened in Indiana?

Mr. Becraft: We raised this issue. We argued to the

Court. We introduced evidence from six states, is my recollec-

tion. Plus, we introduced material from Washington, D.C.; and

the District Court Judge, James E. Noland, denied the motion to

dismiss, overruled it and said that it was his opinion that the

issue was a political question and one upon which the courts

could not rule; and further, he said that the lateness of the

hour precluded us from examining these matters.

Of course, we have arguments against that proposition,

and the purpose of--no matter what the court has in mind for

today, we would like to go ahead and introduce the documenta-

tion for purposes of the record.

The Court: How recently was that decision of Judge

Noland in Indiana, sir?

Mr. Becraft: He ruled on it January 15, 1985.

The Court: That's under appeal, or is that now acade-

mic?

Mr. Becraft: It's on appeal.

The Court: Having heard your position, I would like

now to hear from Mr. Zimmerman as to his view.

Mr. Zimmerman, what is your position in these matters?

Mr. Zimmerman: Your Honor, I think defense counsel

indicated that they weren't going to introduce all the exhibits

because they didn't want to take forever, but it sounds like

it's going to take almost forever.

I think, Your Honor, even if the Court assumes all of

the factual allegation in the defendant's brief in support of

his motion to dismiss, regarding the misspellings and the

misplacing of commas and this type of thing in the Sixteenth

Amendment, as proposed in the various states, Your Honor, that

their motion is without merit because, obviously, the purpose

of attacking the ratification of the Sixteenth Amendment, then,

of course, is to argue that Congress has no power to levy

taxes; but, regardless of the Fifth Circuit case cited by

defense counsel in support of this proposition that it is in

fact the Sixteenth Amendment that gives the Congress the power

to levy taxes, the Supreme Court, in the case of Brushaber v.

Union Pacific Railroad Company, which is cited in our brief,

specifically rejects that particular argument and sets forth

that Section eight of Article one of the Constitution gives

that authority to Congress.

Therefore, even if the factual allegations concerning

the Sixteenth Amendment put forth in defense counsel's brief

are accurate, still their argument must fail, based on the

Brushaber case, as well as the other cases set forth, Your

Honor, in our brief in opposition to the Motion to Dismiss.

The Court: All right. Thank you.

Well, gentlemen, I tell you my views of it. Of

course, this is a matter of first impression to me, but,

Mr. Becraft, here is the way I would think we should proceed.

I am satisfied, from a review of the authority that you have submitted--and I have received the government's position, and I am familiar with that--I think that the motion should be denied. I will deny it without prejudice at this time, sir.

I would like you to do this: You may complete your offer of proof. I don't think, based on the pleadings and the papers that have been filed, an evidentiary hearing is appropriate; however, I will permit you to file, consistent with your offer of proof, any additional documents that you feel are germane to your motion, and I will deny it at this time without prejudice because I don't want to impede the trial which is now set for Monday next.

If there is a change in that position, I would certainly acquaint you with it because I want to read the Fifth Circuit case that you have cited; but it would be my view that the government's position is correct on several grounds.

I was interested in Judge Noland's view of it in Indiana because I do think it would appear to be a political question. I have in mind the fact that there is some 70 years of precedence by Supreme Court decisions in the various circuit courts throughout the nation upholding the validity and constitutionality of this amendment.

I would also think, as to the third ground urged, that

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the government's power to tax does not draw its roots from the Sixteenth, but from the First Article of the Constitution; but,

in any event, I will be happy to read the authorities that you have indicated, and you may supplement the record with whatever documentation you feel would be appropriate so that the record is complete, so that, if I am in error, certainly, it will be apparent from the record; but your request for an evidentiary hearing will be denied.

Mr. Becraft: Your Honor, can I respond to the argument, kind of have a rebuttal?

The Court: Sure.

Mr. Becraft: Your Honor, let me give you this Parker Against Commissioner of Internal Revenue case.

The Court: This is the Fifth Circuit case you had reference to?

Mr. Becraft: I think it's 724 F.2d 659.

Here is the position of the defense in this particular

case. I am totally aware of the provisions of the United

States Constitution in reference to the power of Congress to

tax. That is plain. Congress has been given powers to tax

directly and indirectly, except there are contained within the

confines of the United States Constitution two regulations of

the taxing power of the Federal government.

In reference to the indirect taxation, which would

include excise duties and impost, there is the regulation that

those duties, impost and excises shall be uniform; so that is

the regulation contained within the Constitution that applies

to indirect taxation.

Now, in reference to direct taxation, Congress has

broad powers to tax directly, except there is an--in reference

to that particular power, the exercise of the power to tax

directly, there is another regulation in the Constitution, that

regulation concerning apportionment.

So, notwithstanding the fact that we have, you know,

agreed with the statement made by the prosecution in its brief

yesterday, Congress has the power to tax. That's plain; however, in reference to this particular issue, we contend that

the Pollack case, Pollack 1 and 2, decided in 1894, the cites

which can be provided to the Court; but I think anyone that is

familiar with the income tax issue is familiar with those

cases: Pollack Against Farmer's Loan and Trust Company, which

was decided in 1895. There was a challenge made that the 1894

income tax act of Congress was unconstitutional, in that it

imposed a direct tax and had not been apportioned.

In reference to that particular argument raised in

that case, United States Supreme Court agreed with it and said,

in reference to direct tax, such as the income tax, it was

required to be apportioned and, therefore, the act was found to

be unconstitutional, since it was not apportioned.

Well, as a direct result of the Pollack decision, in

1909, there was much debate in the United States Congress.

That debate concerned ratification of an amendment which would

allegedly circumvent the problem presented by the Pollack deci-

sion.

Now, in 1909, the United States Congress came out and

passed a Senate Joint Resolution Number 40, which is today what

we know as the Sixteenth Amendment. That was submitted to the

states in 1909. Between 1909 and 1913, the various states of

our nation took action upon this particular constitutional amendment, the Sixteenth Amendment.

When the Sixteenth Amendment was proposed on July 12, 1909, the Secretary of State was a man by the name of Flander C. Knox. Flander Knox came in with President Taft's administration. That administration was sworn in in March of 1909.

As Secretary of State, Flander Knox' responsibility included, you know, any legislation that comes out of Congress. He has charge of the National Archives. He keeps the documents there. He's the very man that certifies official documents that come out of Washington, D.C., the Secretary of State.

One of the very first documents, or one of the very first laws which Flander Knox deposited into the archives of the United States was a law which is now embodied in 18 United

States Code Section 1018. That law makes it a criminal offense

for any public official to make any fraudulent or false certi-

ficate. So Flander Knox was totally aware of this law. He was

the Secretary of State that took custody of that first law when

it was passed by Congress.

Well, it is our contention that the documentation that

we do have from the states, and the documentation that we do

have from archives in Washington, D.C., shows conclusively that

Flander Knox committed a crime cognizable under what we call

today 18 U.S.C. Section 1018.

Now, if you take a look at 1018, give the statutory--

the Statute at Large, cite--I think it's 35, Statute at Large,

some page number--that's what we contend that Flander Knox

violated.

The acts about which we complain are tantamount to what is commonly referred to as criminal malversation, that is corruption in high office. Our argument in this case involves public corruption in a criminal offense that was committed by a high public official. We can show that Flánder Knox did commit this crime, and that's what we are arguing about in this case.

It is a case of first impression. All those cases that the government relies upon say: Well, the Sixteenth Amendment has been relied upon, it's been imposed in our Constitution for 70 years; and, therefore, because of the lapse of time, it is a part of the Constitution.

My basic question is: If that is the case, at what point in time did the Sixteenth Amendment become part of the Constitution? If it was ratified in February of 1913, and if

it was not, and if it was an illegal act at that point in time

to ratify that amendment, at what point in time did it ripen

into--from a criminal act into a lawful act, and at what point

in time did it become lawful?

Your Honor, this is a case I would like to draw paral-

lels to with something like--that happened during the Nixon

Administration: Watergate. Those people were high public

officials. They are carried to task for having committed

crimes. That's the exact same thing about which we complain today.

In reference to the lateness of the hour, everybody

can read today that people are being--oh, I didn't know that

came down. People are being tried as Nazi war criminals. Now

World War II is 40 years old, so where does lateness of the

hour come in?

In reference to lateness of the hour, I cannot see how

in the world it would be a valid proposition because there are

United States Supreme Court cases that say, "No matter how old

the practice or how accepted it is, if it's brought under

Constitutional challenge, we'll examine it."

That's exactly what we are raising here in this case today.

The Court: I understand that.

Well, I appreciate your comments, Mr. Becraft. I will

confirm what I have said. I will deny your motion without

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prejudice. You may complete your offer of proof. I under-

stand that you feel strongly about this. It's a matter of

record, and, as I say, the denial is without prejudice.

I would like to review those cases, but so that you

might make your plans accordingly, the motion is being denied

at this time. The trial would go forward on Monday next, and you may supplement the papers, as I have indicated, and, if I am wrong, it will be very apparent from this record.

If you are right, you are right, but I disagree with you, and I feel, for the reasons advanced by the government in this case, that your motion should be denied.

So that would be my ruling, sir. I appreciate your comments.

Mr. Becraft: How would we go through the mechanics at this point in time? Would you want us to do it right now, to make our offer of proof?

The Court: You may file a written pleading containing any supplementary material to your offer of proof which you have filed, and they may be lodged with the court, sir, pursuant to this motion.

Mr. Becraft: Your Honor, could I confer with my

witness that will testify? If I may take just a few minutes, Your Honor.

Mr. LaFountain: Your Honor, may I make two brief

points--not in light of argument, but simply points to ponder?

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It occurs to me that, if the government's contention

is correct, that the Sixteenth Amendment, the validity of the

Sixteenth Amendment and the construction of the Sixteenth

Amendment are, to use the government's words, political ques-

tions, I would submit that that same analogy would apply to the

Fourteenth Amendment; and it's obvious, since every year, year

in and year out, sufficient volumes of case law on the Four-

teenth Amendment are generated in courts throughout the land,

to fill this room, every year, that there must be something in

our law that requires the courts and Your Honor himself to

review any potential problems with the very basic laws of our nation, the Constitutional provisions.

Irrespective of whether or not one can make an esoteric argument about whether or not it's a political question--

The Court: I don't mean to cut you off, Mr. LaFountain.

Mr. LaFountain: Please, Your Honor.

The Court: No. Let me talk. No, it's my turn.

Mr. LaFountain: Yes, sir.

The Court: When this argument was presented, you designated counsel to argue it. I don't want to have to, in effect, go through a whole series of interrogatories or statements. My business, your business, is to present your position, and I know it's strongly felt, and I appreciate that, but you have designated counsel. I have ruled at my peril, and I

have ruled because I think you are entitled to know that, but this isn't some continuing dialogue we are going to have.

Mr. LaFountain: I am aware of that.

The Court: It isn't that first one counsel speaks and then I rule and then someone else gets up and says, "Here's something else." This isn't something that we are talking to a parade. I rule, and I am right or I am wrong. I try and do my job as best I can, as you try and do your job as best you can. This isn't some continuing discussion that I am monitoring.

With that in mind, is there anything else?

Mr. LaFountain: May I have 15 seconds, Your Honor?

The Court: Sure.

Mr. LaFountain: I submit to the Court for consideration that Mr. Zimmerman's contention in regard to--strike that.

I can see we are getting into an argument if I con-

tinue.

The Court: While you are there, let me ask you a

couple questions, sir.

This is an opportunity we might have to discuss

briefly the mechanics of the trial set to start on Monday. I

was wondering if there is any particular voir dire questions

you would like me to ask the jury. Does any come to your mind?

or, if you care to, you can submit them in writing early Monday

morning; but, if you have them in mind, if there is any area

you would like to have explored by the jury, I would be happy

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to have you do that, sir.

Does any come to mind?

Mr. LaFountain: It occurs to me that--

(Pause.)

It occurs to me that, if Congress has the power to adopt a statute under which my client is charged, irrespective of the Sixteenth Amendment, that, to a logical person, it should raise a question as to why they went to all of the trouble to adopt it in the first place; and, frankly, Your Honor, I can't get beyond that. I cannot get beyond that, and frankly, I guess I will have to take the Court and the Jury as it is handed to me by Your Honor and do with it as best I can.

The Court: Well, I certainly won't try your case for you, Mr. LaFountain, and you are free to pursue any course that you desire, but, if you like, I would be very content to ask questions which you feel should be asked the jurors, and if I don't have any from you or the government, I will intend to conduct a comprehensive voir dire examination so that you can

intelligently exercise peremptory challenges.

Mr. Zimmerman, do you have any particular questions

you want me to ask?

Mr. Zimmerman: Your Honor, I will have to think about

it. If I do, I will provide those to the Court first thing

Monday morning.

The Court: Mr. LaFountain, can you give me a time

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estimate?

Mr. LaFountain: I assume Your Honor is referring to

time for our side?

The Court: Generally, do you have any idea how long

the case will take to try?

Mr. LaFountain: Five days ago Mr. Zimmerman pre-

sented me with a stack of documents, conservatively, that high.

I have no idea how long or who he intends to put the documents

into the record with.

The Court: Mr. Zimmerman, how long do you think the case will take to try?

Mr. Zimmerman: I have roughly 20 witnesses. Most of them will be very brief, just to identify documents. I think the government, assuming we start the trial, say, noon, one o'clock Monday, should finish up sometime early Tuesday afternoon.

The Court: Okay. Gentlemen, are there any particular problems or evidentiary concerns either of you had that I should be aware of that I can be considering before we start the trial, that might expedite it?

Mr. Zimmerman?

Mr. Zimmerman: I have none, Your Honor.

The Court: What about you, Mr. LaFountain?

Mr. LaFountain: For the record, I would like to make

25 a point or amplify the point I just made.

Page twenty-one

1 Laura Lee and I were presented with permission from

2 Mr. Zimmerman four working days ago, including today, to look

3 at a stack of documents of over two-and-a-half feet high, which

4 the prosecution proposed to use in the prosecution of our

5 client. I have some problems with that. The problems relate

6 to the obvious. My duty is, as defense counsel, is to properly

7 defend. I submit that I may be under a bit of a handicap and

8 that handicap has been imposed upon me and my client by the

9 government, for the record.

10 The Court: Mr. Zimmerman?

11 Mr. Zimmerman: Your Honor, in that respect, Mr. Stahl

12 was arraigned on March 14, 1985. That particular stack of

13 exhibits referred to by defense counsel has been in my office

all that time, with the exception to particular small exhibits.

They have been available to defense counsel.

The Court: Did you tell them that?

Mr. Zimmerman: He never asked. When he asked me,

Your Honor, I opened up our files to him, and even went as far

to make copies without charge to them of the material they

sought. It has been available since that time.

The Court: I would appreciate it if you would do

this, Mr. Zimmerman. If you could point out with particularity

those portions of the exhibits that you actually intend to

offer, so that he has some insight as to those particular

documents that you will be offering in evidence.

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Mr. Zimmerman: Yes, Your Honor.

Mr. LaFountain: Your Honor, at the arrignment, I

asked Mr. Zimmerman if the policy would be an open-file policy,

and if they would tender to me the information. I went over on

various occasions from the arraignment.

The Court: Did he reply?

Mr. LaFountain: He replied that the policy was open,

that he would provide me with the material. I went on numerous

occasions, Laura Lee and myself, over there. On each occasion,

we were told by the secretary or personnel in each U.S. Attor-

ney's office, "We cannot give you the information personally.

You have to get it from Mr. Zimmerman." "Mr. Zimmerman is in

Great Falls." "Mr. Zimmerman is wherever Mr. Zimmerman is."

The fact of the matter is that we had no access to

that until four working days ago, including today.

One more thing for the record, if I may. I submit

that it is not the duty, in any court in the United States, of

a defense attorney to undertake any affirmative obligations.

My client is before this Court, when he gets there, innocent,

presumed to be innocent, and Mr. Zimmerman cannot put any

affirmative burdens upon my side.

The Court: Mr. LaFountain, I defended criminal cases

for 25 years. That's what I did for a living. You don't have

to instruct me on obligations of a defense counsel. I know

that. I know yours.

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Mr. LaFountain: Thank you.

The Court: I am quite familiar with that, sir.

Mr. LaFountain: Thank you.

The Court: The only reason I asked Mr. Zimmerman to

point out with particularity those matters that he intended to

offer, so that it would expedite your work over this weekend,

sir.

Mr. LaFountain: I appreciate it.

The Court: Mr. Becraft, back to you, sir.

As I say, you may supplement the record with written

pleadings setting out with particularity your offer of proof.

Mr. Becraft: Your Honor, could we take testimony of

my witness in that respect?

The Court: No. I don't think an evidentiary hearing

is necessary or appropriate in this case, sir.

You may file that, sir.

Is there anything further?

Mr. Becraft: No, but, Your Honor, we really need, in

order to do this, we need a transcript of a hearing with my

witness.

If the Court would want to leave the room, and if we

could just have the Court Reporter here, we could just--

The Court: Mr. Becraft, to my knowledge, that's a procedure that I have never been involved in. I assume that you, as a competent lawyer, have been involved in offers of

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proof before.

Mr. Becraft: Right.

The Court: They are made normally by affidavit. I would assume that would be the correct and proper way to proceed in this case.

Mr. Becraft: Your Honor, I wondered if we could do it by deposition, since the Court Reporter would be here.

The Court: Well, if you want to make arrangements for that--if you want to make arrangements for that. Deposition presupposes another side, sir. Offer of proof normally is by

affidavit.

Mr. Becraft: The problem I have is that I am from Huntsville, Alabama. The witness is from South Holland, Illinois. For us to get together and work it out, I would be--it would be a great benefit for us, on this point.

The Court: If you can make arrangements with the reporter or any shorthand reporter here in Billings during your stay, sir, I will impose no time limit. That may be filed within the next ten days, sir, your supplementing materials. So you are perfectly free to do that, if you prefer that procedure, sir.

All right. Thank you, gentlemen.

Gentlemen, ladies, if there is nothing further, I look forward to seeing you all on Monday morning at nine o'clock.

(Recess.)

CERTIFICATION

I hereby certify that I am a duly appointed, qualified and acting official court reporter for the United States District Court; that the foregoing is a true and correct transcript of the proceedings had in the aforementioned cause on April 19, 1985, that said transcript is a true and correct transcriptions of my stenographic notes; and that the format used herein complies with the rules and requirements of the United States Judicial Conference.

DATED: July 5, 1985, at San Diego, California.

D. Joan King, Offl. Rptr.
CSR No. 2335

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